

Nicholas Tan Chye Seng v Au Gek Wee (No 1)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
24-149-07 OF 2013
NORAINI ABDUL RAHMAN J
22 AUGUST 2013

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Civil Procedure — Jurisdiction — Forums conveniens — Application for guardianship, custody, care and control of child — Malaysian citizens living in Malaysia — Child taken by defendant to Singapore after matrimonial dispute — Whether forum conveniens was Malaysia

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Family Law — Children — Guardianship — Application for — Applicant wife fail to comply with earlier interim order — Court refuse to hear wife's application for guardianship, custody, care and control of child — Law Reform (Marriage and Divorce) Act 1976 — Scope of application — Whether the Act applies to Malaysians resident outside Malaysia — Rebuttable presumption Malaysia citizens domiciled in Malaysia

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The plaintiff husband (PH), defendant wife (DW) and their son Adyan were all Malaysian citizens. They all were staying in Malaysia before DW took Aydan to Singapore without the knowledge of the PH after an argument. PH filed this action praying for guardianship, custody, care and control of Aydan. The court granted an interim order granting sole custody, care and control of Aydan to the PH, amongst others. The notice of the originating summons was served on the DW in Singapore. The DW then filed the present application ('encl 37') to set aside the originating summons and service thereof alleging that the court did not have jurisdiction to hear this matter. DW also sought for a stay of proceedings pending the final resolution of the proceedings commenced by her in the Singapore High Court. DW's counsel raised the issue of forum of convenience. Enclosure 37 was dismissed and DW filed this appeal against that decision.

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Held, dismissing the application in encl 37 with costs of RM5,000:

- (1) The forum conveniens was Malaysia since all parties were Malaysian and stayed in Malaysia until the DW decided to take Adyan to Singapore. Aydan was studying in Alice Smith School. So, by her taking and moving away to Singapore, it was actually her own voluntary conduct. Further, since the originating summons and all other applications were by way of affidavit evidence, parties need not appear in person before the court. Therefore, the submission on forum non conveniens did not hold water (see paras 19–20).

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- A (2) The Law Reform (Marriage and Divorce) Act 1976 ('Act') applies to Malaysians even though they are resident outside Malaysia, which was exactly the position in the present case. Pursuant to s 3(2) of the Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia. On the present facts, all parties were
- B Malaysian and were deemed, until the contrary was proved, to be domiciled in Malaysia. DW had not rebutted the presumption that she and Aydan were no longer domiciled in Malaysia or were no longer resident in Malaysia (see paras 23–24).
- C (3) As at the date of submissions, the DW had not complied with the interim order. Hence, the court could not hear the DW's application in encl 37 (see para 28); *Wee Choo Keong v MBF Holdings Bhd & Anor And Another Appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 referred.

[Bahasa Malaysia summary]

- D Plaintiff suami ('PS'), defendan isteri (DI) dan anak mereka Adyan adalah rakyat Malaysia. Mereka kesemuanya tinggal di Malaysia sebelum DI membawa Aydan ke Singapura tanpa pengetahuan PS selepas pertengkaran. PS memfailkan tindakan ini memohon untuk penjagaan, jagaan, menjaga dan
- E mengawal Aydan. Mahkamah memberikan antara lain perintah interim memberikan jagaan, menjaga dan kawalan ke atas Aydan kepada PS. Notis saman pemula diserahkan ke atas DI di Singapura. DI kemudiannya memfailkan permohonan ini (lampiran 37) untuk mengetepikan saman pemula dan penyerahannya dengan mendakwa bahawa mahkamah tidak
- F mempunyai bidang kuasa untuk mendengar perkara ini. DI juga memohon untuk penangguhan prosiding sementara menunggu resolusi akhir prosiding yang dimulakannya di Mahkamah Tinggi Singapura. Peguam DI membangkitkan isu *forum of convenience*. Lampiran 37 ditolak dan DI memfailkan rayuan terhadap keputusan tersebut.

- G **Diputuskan**, menolak permohonan lampiran 37 dengan kos dengan RM5,000:

- H (1) *Forum conveniens* adalah di Malaysia memandangkan kesemua pihak adalah rakyat Malaysia dan tinggal di Malaysia sehingga DI memutuskan untuk membawa Adyan ke Singapura. Aydan belajar di Alice Smith School. Oleh itu dengan membawa Aydan dan berpindah ke Singapura, merupakan secara tindakannya sukarela. Selanjutnya, memandangkan saman pemula dan kesemua permohonan lain adalah melalui keterangan
- I affidavit, pihak-pihak tidak perlu hadir di hadapan mahkamah. Oleh itu, penghujahan atas *forum non conveniens* tidak berasas (lihat perenggan 19–20).
- (2) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') diguna pakai kepada rakyat Malaysia walaupun mereka

pemastautin di luar Malaysia, yang mana adalah kedudukan sebenar dalam kes ini. Berikutan s 3(2) Akta, seseorang yang adalah rakyat Malaysia akan dianggap, sehingga dibuktikan bertentangan, bermastautin di Malaysia. Atas fakta ini, kesemua pihak adalah rakyat Malaysia dan dianggap, sehingga dibuktikan bertentangan, bermastautin di Malaysia. DI tidak mematahkan anggapan bahawa dia dan Aydan bukan lagi bermastautin di Malaysia atau bukan lagi pemastautin di Malaysia (lihat perenggan 23–24).

- (3) Pada tarikh penyerahan, DI tidak mematuhi perintah interim. Maka, mahkamah tidak dapat mendengar permohonan DI dalam lampiran 37 (lihat perenggan 28); *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 dirujuk.]

Notes

For cases on forum convenience, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5245–5263.

For cases on guardianship, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3609–3626.

Cases referred to

Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 24(d)

Divorce and Matrimonial Proceeding Rules 1980 r 81(1)

Law Reform (Marriage and Divorce) Act 1976 s 3, 3(2)

Matrimonial Causes Rules 1957 [UK] r 10(1)

Noraini Abdul Rahman J:

[1] This is an appeal by the defendant wife against my decision made on 21 August 2013 whereby I had dismissed the defendant wife's application at encl 37. Below are my reasons for dismissing the said application.

[2] The application at encl 37 is reproduced below:

- (a) an order setting aside the originating summons dated 17 July 2013 (the 'originating summons') or service of the originating summons on the defendant;
- (b) an order declaring that the originating summons has not been duly served on the defendant;

- A (c) that the order dated 19 July 2013 giving leave to serve the originating summons out of the jurisdiction be discharged;
- (d) that the order dated 31 July 2013 giving leave to serve the originating summons out of the jurisdiction by substituted service be discharged;
- B (e) a declaration that in the circumstances of the case, this Honourable Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action herein; or
- (f) alternatively, that all further proceedings in the plaintiff's action herein against the defendant be stayed on the ground of *forum non conveniens* and/or *lis alibi pendens*;
- C (g) further alternatively, that all further proceedings in the plaintiff's action herein against the defendant be stayed pending and until the final determination and resolution of the proceedings in the Republic of Singapore in Suit No OSF351/2013/J commenced by the defendant on 31 July 2013 against the plaintiff which is presently ongoing in the Singapore High Court;
- D (h) If necessary, the time limited for the defendant to file her affidavit in reply be extended to such time as the court should think fit.
- E (i) The costs of and incidental to this application be paid by the plaintiff to the defendant; and
- (j) Such further and or other relief (s) deemed suitable by this Honourable Court.
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[3] In short, the defendant wife was asking for a stay of the proceedings in the Malaysian court because this court has no jurisdiction over the defendant wife in respect of the subject matter claimed.

- G [4] The plaintiff husband (PH), the defendant wife (DW) and their son are all Malaysian citizens. They all were staying in Malaysia before DW took their son Aydan to Singapore without the knowledge of the PH on 27 June 2013.

- H [5] All parties, including Aydan, have been residing in Malaysia after their return from Hong Kong in 2006. Before being taken to Singapore, Aydan was attending the Alice Smith School in Jalan Bellamy Kuala Lumpur. Before that, Aydan studied at the Chiltern House in 123, Jalan Bukit Pantai, Bangsar, Kuala Lumpur. On 19 June 2013, both the PH and DW was alleged to have an argument. Then on 27 June 2013, DW took Aydan to Singapore at a time when Aydan was still schooling in Kuala Lumpur, there being three weeks left before the end of the school term.
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[6] On 17 July 2013 the PH filed an application in this court (encl 1) praying

for amongst others that the PH be granted sole guardianship, custody, care and control of Aydan and that reasonable access in the presence of PH be given to the DW.

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[7] It is an undisputed fact that the DW had been personally served with encls 1 and 5 which are an ex parte applications of guardianship, custody, care and control of Aydan to the PH. On 19 July 2013, I had granted an interim order at encl 15 granting interim sole custody, care and control of Aydan to the PH, amongst others.

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[8] I had also allowed the application at encl 16 for leave to issue a notice of the originating summons to be served out of jurisdiction against the DW and to serve the notice of originating summons and other relevant documents.

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[9] Then on 20 August 2013, the DW filed the application at encl 37, which is the subject matter of this appeal.

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[10] On 21 August 2013 I heard the application for stay of proceedings in this court (encl 37) because of the DW's allegation that this court do not have jurisdiction to hear this matter including the inter parte hearing of encl 1. All parties decided that it would be best to hear this application at encl 37 first because if there is no jurisdiction, it would be pointless to go ahead and hear encl 1.

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[11] Both counsels had submitted based on their written submissions.

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[12] Counsel for the DW submitted that as discussed in *Cheshire on Private International Law*, (7th Ed) (1965) the settled common law principle of private international law that no action in personam will lie against a defendant in England unless he has been served with a writ while present in England. She went on further to submit that the only exception of this principle in England is, as regards a matrimonial cause, such as a suit for divorce where the petitioner has an absolute right to serve process upon respondent abroad without obtaining leave. She cited the English Matrimonial Causes Rules 1957 r 10(1). So coming back to the case before me, what the DW's counsel submitted makes sense as I can apply it to our case. Matrimonial causes would include guardianship, care, control and custody of the child of the marriage. The English Matrimonial Causes Rules 1957, r 10(1) is reproduced below—

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A petition, originating summons, notice or other document a matrimonial cause or matter may be served out of the jurisdiction without leave in manner provided by these Rules ...

A [13] This is also provided in r 81(1) on the Divorce and Matrimonial Proceeding Rules 1980 which provides as follows:

Any document in matrimonial proceedings may be served out of Malaysia —

B a) where the proceedings are pending in the High Court, in accordance with RHC Order 11, rules 5 and 6 (service of a writ abroad).

C [14] Therefore it would appear that both England and Malaysia have the same principle ie any document in matrimonial proceedings can be served abroad.

D [15] Counsel for the DW also said ‘Therefore the fact that a tort had been committed or that a contract has been made and broken in England DOES NOT render the English court competent even though the defendant is domiciled and ordinarily resident in the country’. She then cited various authorities to support her submission. It is noticed that the cases cited are cases not involving matrimonial matters. For example she stated at para 14 of her written submission the following:

E 14 Again, before the issue of a writ an English debtor escapes abroad or if a foreigner returns home after contracting an obligation here, the judicial machinery of England cannot be put in motion. The only remedy of the aggrieved party in such cases is to follow the wrongdoer to his place of residence in accordance with the maxim *actor sequitur forum rei* (‘The plaintiff follows the forum of the thing in dispute’):

F Note that the action here was against a debtor.

[16] At para 18 of her written submission DW’s counsel said:

G 18 *Re Busfield* (Tab 8, DBA) was a case which concerned an originating summons taken out against 2 executors and trustees of a will, where one of them was temporarily resident out of jurisdiction. In determining whether the originating summons could be served on a defendant out of jurisdiction, Cotton, LJ held at p 131 that service out of jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction, and that apart from statute, a court has no power to exercise jurisdiction over anyone beyond its limits. Therefore, it was held (at p 132) that the Court had no power to order service out of the jurisdiction except where it is authorized by statute to do so.

I Again note that the case was as regards executors and trustees of a will. It was not matrimonial matter.

[17] At para 20(c), counsel said the following:

(c) *In re Dulles' Settlement (no 2)* [1951] Ch 842 CA [Tab 14, DBA]: A defendant who appears by counsel to contest the jurisdiction of a Court does not thereby voluntarily submit to its jurisdiction. The Husband ('H') in this case obtained a divorce decree in France in May 1946. The Wife ('W') brought the son to England in September 1947 and remained there with the son ever since. H obtained in France an order giving him custody which was never put in operation because in February 1948, W as Next friend of the son brought an action against his maternal grandparents claiming to be a ward of Court and in June 1948, the son by his Next friend [W] took out a summons asking for his mother to be given custody. H contested it relying on his custody order given in France, but nevertheless W was granted custody.

Per Denning, LJ (at p 850): The judge must have been of opinion that was in the interests of the child: see *In re B's Settlement* [1940] Ch 54.

Evershed MR delivered a concurring judgment (at p 846).

(d) *McKee v McKee* [1951] AC 352 (Tab 15, DBA): Husband and wife, American citizens, separated and agreed in writing that neither of them, without the permission of the other, would remove their son out of the USA. A year later, Husband obtained a decree of divorce from a Californian Court and an order awarding him the custody of the Child and confirming the written agreement. About 4 years later, the same Court, on the applications of both parties, awarded custody to the Wife, whereupon the Husband took his son to Ontario without the leave or knowledge of his wife. The wife thereupon took habeas corpus proceedings in Ontario. The trial judge, after a careful review of the circumstances, awarded custody of the Child to the Husband, but his decision was reversed by the Supreme Court of Canada. The Privy Council restored the Ontario decision. The 2 charges leveled against the Husband that he had broken the agreement with his Wife and had flouted the Order of the Californian Court, had been adequately considered by the trial judge, who, in the opinion of the Court, was justified in concluding that in light of the other circumstances, the interests of the child would best be served by leaving him in the custody of the father. The order of the Californian Court was a factor of great importance but it was not decisive. It was also held that the welfare and happiness of the infant is the paramount consideration in questions of custody and to this, all others yield. The order of a foreign Court is no exception; comity demands not its enforcement but its grave consideration.

[18] Again it is to be noted that the court considered the welfare and happiness of the infant as the paramount consideration in questions of custody and all others must yield.

[19] Apart the submissions above, the DW's counsel also relied on forum of convenience and quoted cases to support her contention. In my opinion the forum conveniens is Malaysia since all parties are Malaysian, stayed in Malaysia until the DW decided to take the son to Singapore. The son Aydan was studying in Alice Smith School. So, by her taking and moving away to Singapore, it was actually her own voluntary conduct. As such I find that forum conveniens is Malaysia.

A [20] In addition, this originating summons and all other applications are by way of affidavit evidence. Parties need not appear in person before the court. Take for example the DW's application at encl 37. Her supporting affidavit at encl 38 was affirmed in Singapore on 14 August 2013. Therefore again, the submission on forum non conveniens does not hold water.

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C [21] The PH's counsel submitted that this court has jurisdiction. She submitted that as regards guardianship, this court has jurisdiction to make orders pursuant to s 24(d) of the Courts of Judicature Act 1964 which provides this court 'jurisdiction to appoint and control guardians of infants'. I agree with her submission and I now reproduce the said s 24(d) of the Courts of Judicature Act 1964 as follows:

Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:

- D**
- (a) jurisdiction under any written law relating to divorce and matrimonial causes;
 - (b) ...
 - (c) ...
- E**
- (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants.

F [22] Thus, without any prohibition or specific provision as to jurisdiction outside Malaysia, this court has jurisdiction over this custody matter.

G [23] To fortify the issue that this court has jurisdiction over Malaysian living or residing abroad which in this case in Singapore where the DW and Aydan just went recently on 27 June 2013, s 3 of the Law Reform (Marriage and Divorce) Act 1976 provides the following —

3 Application

- H**
- (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
 - (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.”.

I [24] It is therefore very clear that the Law Reform (Marriage and Divorce) Act 1976 apply to Malaysian even though they are resident outside Malaysia, which is exactly the position in our case since both the DW and Aydan are persons domiciled in Malaysia but currently residing in Singapore. Again, looking at s 3(2) of the LRA, a person who is a citizen of Malaysia shall be

deemed, until the contrary is proved, to be domiciled in Malaysia. On the facts of our case, all parties are Malaysian and are deemed, until the contrary is proved, to be domiciled in Malaysia. There is nothing in the submission of the DW's counsel nor in the DW's supporting affidavit to say that she is not domiciled in Malaysia as required under the section quoted above. In short, the DW had not rebutted the presumption that she and Aydan no longer domicile in Malaysia or are no longer resident in Malaysia. As such, I hold that the DW and Aydan are still domiciled in Malaysia. As such, this court has jurisdiction over this matter and therefore all the orders granted by this court are to be complied by the DW.

[25] The PH's counsel also submitted on the question of forum non conveniens. As I had already dealt with the issue earlier, I will not revisit it save to reiterate that Malaysia is the forum of convenience for this case to be heard.

[26] This court had granted interim orders dated 19 July 2013 as follows:

ORDER

(ENCLOSURE 5)

UPON THE APPLICATION by the plaintiff abovenamed *AND UPON READING* the Ex-Parte Notice of Application dated 17th. July 2013 and the affidavit in support of Nicholas Tan Chye Seng affirmed on the 17 July 2013 all filed herein *AND UPON HEARING* Ms Foo Yet Ngo (together with Ms Sharon Tee), Solicitors for the plaintiff abovenamed *IT IS HEREBY ORDERED BY INTERIM* as follows that:

1. the plaintiff, NICHOLAS TAN CHYE SENG (NRIC No 730711-05-5103), be granted interim sole custody, care and control of the child of the marriage, AYDAN ALEXANDER TAN CHUNG SHING (Birth Certificate No: BE63959/NRIC No: 03061-10-2057) ('the said Child').
2. the defendant shall forthwith upon being served the Order herein return the said Child to the jurisdiction of Malaysia and into the custody of the plaintiff.
3. the defendant shall forthwith upon returning the said Child to the jurisdiction of Malaysia deliver the said Child's passport to the plaintiff.
4. upon the said Child being returned to the jurisdiction of Malaysia and custody, care and control of the plaintiff, the defendant either by herself, her servants or agents be restrained from taking the said Child out of Malaysia without the leave of this Honourable Court.
5. notice of this Order be given to the Jabatan Imigresen Malaysia by the Jabatan Imigresen Malaysia being provided with a copy of this Order.

AND IT IS ALSO ORDERED that inter parte hearing is fixed on 31 July 2013 at 9.00am.

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Dated the 19 July 2013.

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[27] As at the date of submissions, the DW had not complied with the order at encl 15 above. The court, in addition to all the above reasons find that it cannot hear the DW's application at encl 37. In the case of *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210, the Supreme Court, in the judgment of the Lord President, Abdul Hamid bin Omar said:

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Central in these appeals lies the important principle governing the rights, if any, of defendants who disobey orders of Court and then come forward to set aside the order disobeyed or to seek other relief from the Court.

Obedience to Court Order.

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It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

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It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.

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The recent decision of Abdul Malek J in *Instituto Bancario San Paolo Di Torina SPA v Colour Touch Sdn Bhd & Anor*, delivered on 5 February 1993 (see [1993] 3 CLJ 34) was cited in support of the proposition that the rule would only apply where a writ of attachment or order of committal had been made. In our judgment, such a qualification on the application of the rule would be to place an unnecessarily low burden of obedience on the offending party. The rationale for the rule is public policy. Orders of Court must be treated with respect and require strict obedience.

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In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

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[28] In our case, as at the date of submissions, the DW had not complied with the order of this court. Following the decision of the Supreme Court in the *Wee Choo Keong's* case, DW had to comply the order of court and therefore she 'has to a certain extent, forfeited his (her) right to be heard or at least postponed that right until he (she) has suitably purged his (her) contempt.'

[29] It was for all the above reasons that I had dismissed the DW's application with costs of RM5,000. A

Application in encl 37 dismissed with costs of RM5,000.

Reported by Kanesh Sundrum B

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